



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 113 OF 2018

ISAAC WESONGA.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Isaac Wesonga, herein referred to as the applicant was convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to suffer death which sentence the trial court commuted to life imprisonment. He was dissatisfied with the conviction and the sentence and filed the appeal herein. Meanwhile he filed an application dated 16th April, 2019 seeking that he be released on bond pending the hearing and determination of the appeal.

2. The grounds in support of the application are that the applicant was on bond when the case was heard at the lower court and adhered to the conditions of bail until the time he was convicted. That he has a fixed abode as he lives with his parents at a place known to the local administrators. That the appeal has high chances of success. That he shall abide by all the conditions of bail that this court may set.

3. This court has powers under the provisions of section 357 of the Criminal Procedure Code to grant a convicted person bond/bail pending the hearing and determination of his/her appeal.

4. The principles under which a court may grant a convict bond/bail pending appeal were stated by the Court of Appeal in **Jivraj Shah Vs Republic (1980) eKLR** where the court stated that:

(a) The principal consideration in an application for bail pending appeal is the existence of exceptional or unusual circumstances upon which the Court of Appeal can fairly conclude that it is in the interest of justice to grant bail.

(b) If it appears prima facie from the totality of the circumstance that the appeal is likely to be successful on account of some substantial point of law to be argued and that the sentence or substantial part of it will have been served by the time the appeal is heard, conditions for granting bail exists.

(c)The main criteria is that there is no difference between overwhelming chances of success and a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed and the proper approach is the consideration of the particular circumstances and weight and relevance of the points to be argued .

5. In **Somo Vs Republic (1972) EA 476** the said court held that the most important ground is that the appeal has an overwhelming chance of being successful, in which case there is no justification for depriving the applicant of his freedom.

6. It has also to be borne in mind when considering an application for bond pending appeal that the applicant has at that stage been convicted of the offence and therefore that the presumption of innocence until proven guilty does not apply. In **Douglas Mutunga Muthenya Vs Republic (1988) KLR 497**, the Court of Appeal held that –

“It must be remembered that an applicant for bail has been convicted by a properly constituted court and is undergoing punishment because of that conviction which stands until it is set aside on appeal. It is not wise or to set the applicant at liberty

either from the point of view of his welfare or of the state unless there is a real reason why the court should do so.”

7. The evidence against the appellant was that he and two other people attacked the complainant at 5 a.m. and robbed him of cash Ksh. 10,000/=, a mobile phone and 2 sacks of omena all to the total value of Ksh. 45,000/=. The complainant testified that the people who robbed him were well known to him. That he identified the people. He reported to the police and they were arrested and charged.

8. The complainant stated in his evidence that he identified his attackers by aid of moonlight. The investigating officer PW3 on his part stated that the complainant told him that it was dark at the time that he was attacked. The question in the appeal will be whether the complainant identified the applicant if he never mentioned the moonlight to the investigating officer. Though I may not want to prejudice the hearing, there is a high chance of the appeal succeeding.

9. The applicant was on bond of Ksh. 500,000/= during the hearing at the lower court. I grant him bond of similar amount with one surety of similar amount.

Delivered, dated and signed in open court at Kakamega this 12th day of June, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Ng'etich for State

Appellant/applicant - present

Court Assistant - George